IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

FLOREN DI PAGLIA,
Petitioner

vs.

STATE OF IOWA,
Respondent

BRIEF IN BEHALF OF STATE OF IOWA, RESPONDENT, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioner was indicted and convicted, after trial to a jury, of bribery in an athletic contest, it having been charged that he offered money to Benjamin James Bumbry, Jr., a Drake University player, with intent to influence him to fix the score in a basketball game on December 22, 1953 at Des Moines, Iowa, between that University and Iowa State College. He was sentenced to an indeterminate term not to exceed ten years in the Men's Reformatory at Anamosa, Iowa.

On appeal the Supreme Court of Iowa held, on July 27, 1955 (Rehearing denied October 21, 1955), that the crime with which he was charged was not a felony, and modified and affirmed the judgment of conviction and remanded the cause to the Polk County District Court for judgment sentencing the petitioner to pay "such fine, not exceeding $10,000, or undergo such imprisonment in the county jail, not exceeding ten years, or both, with costs, as the trial court may determine is proper." (*State v. Di Paglia,* 247 Iowa ..., 71 N.W. 2d 601).

Upon the remand, the District Court of Polk County, Iowa, after hearing had and evidence presented, entered judgment sentencing petitioner to a term of five months at hard labor in the Polk County Jail, and to pay a fine of $1,000, and providing that upon failure to pay the fine, the petitioner should be committed to the jail for an additional period of time at the rate of $5.00 per day, same to run consecutively with the five months. The petitioner appealed from this judgment to the Supreme Court of Iowa, and on September 18, 1956, said Court affirmed the same. (*State v. Di Paglia,* ... Iowa ..., 78 N.W. 2d 472). Subsequently and within the time required by law a petition for rehearing was filed by petitioner, and resistance thereto filed by the State. Rehearing was denied on November 16, 1956, and the case is now pending in this Court upon petition for writ of certiorari.

It is petitioner's contention herein that the statute, Section 739.12, Code of Iowa 1954, is void and in violation of rights protected by the Fourteenth Amendment to the Constitution of the United States.

ARGUMENT

THE IOWA STATUTE CREATING THE OFFENSE OF BRIBERY IN AN ATHLETIC CONTEST AND PROVIDING FOR A PENALTY OF A FINE NOT EXCEEDING TEN THOUSAND DOLLARS OR IMPRISONMENT NOT EXCEEDING TEN YEARS, OR BOTH, FOR VIOLATION THEREOF (SECTION 739.12, CODE OF IOWA 1954), IS NOT VIOLATIVE OF THE CONSTITUTIONAL PROVISIONS AGAINST CRUEL AND UNUSUAL PUNISHMENTS AND DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FEDERAL CONSTITUTION. ONE CHALLENGING A STATUTE HAS THE BURDEN TO OVERCOME THE PRESUMPTION THAT IT IS CONSTITUTIONAL AND TO CLEARLY SHOW IT TO BE INVALID.

In 1953 the Iowa Legislature created an offense which it named "Bribery in athletic contests". Clearly it was empowered to do that. It then proceeded to define the offense in detail, and provided for penalties to be assessed against one guilty of committing the offense. The maximum penalty provided for "Bribery in athletic contests" under the Iowa Statute is a fine of $10,000 and imprisonment for ten years. The Supreme Court of Iowa held the crime denounced by the statute (Section 739.12, Code of Iowa 1954), not to be a felony. Petitioner herein contends that since an offender may, under the Supreme Court's holding, be required to serve the maximum penalty provided for in a county jail, rather than in a state penitentiary or reformatory, that the punishment provided for is so "cruel and unusual" as to cause it to fall within the prohibitions of the due process clause of the Fourteenth Amendment to the Federal Constitution. With this contention, respondent cannot agree.

A large discretion is vested in a state legislature in the fixing of penalties imposed by a statute to effectuate the manifest intent of the legislature to suppress the notorious mischief and evil that it intended to prohibit by the enactment of its statute. Punishment by fine and imprisonment, is not per se cruel and unusual. *Bailey v. United States*,

C.C.A. Ill., 284 F. 126; *People ex rel Bradley v. Illinois State Reformatory*, 148 Ill. 413, 36 N.E. 76; *Hobbs v. State*, 133 Ind. 404, 32 N.E. 1019; *State v. Staub*, 182 La. 1040, 162 So. 766. Sentences consisting of both fine and imprisonment, as authorized by statute, rest in the Court's discretion and are not cruel and unusual. *People v. Elliott*, 272 Ill. 592, 112 N.E. 300; *Pervear v. Massachusetts*, 5 Wall. (U.S.) 475, 18 L. ed. 608. Nor is the imposition of a term of imprisonment on failure to pay a fine cruel and unusual punishment, although by reason of the amount of numerous fines in the aggregate the imprisonment will require several years of work. *Foertsch v. Jameson*, 48 S.D. 328, 204 N.W. 175; *Ex parte Brady*, 70 Ark. 376, 68 So. 34. And punishment will not be declared excessive merely because confinement might undermine the health of one convicted of crime. *State v. Van Klavern*, 208 Iowa 867, 226 N.W. 81.

A constitutional prohibition against cruel and unusual punishment is directed primarily against the character of the punishment rather than against its amount or duration, and refers to inhuman or barbarous treatment, and the fact that the punishment authorized by statute may be severe does not make it cruel or unusual. *Ex parte Garner*, 179 Cal. 409, 177 P. 162; *Kistler v. State*, 190 Ind. 404, 129 N.E. 625; *State v. Spano*, 320 Mo. 280, 6 S.W. 2d 849; *Ginsberg v. United States*, C.C.A. Tex., 96 F. 2d 433.

"Cruel" as applied to punishment for crime refers to form of punishment and "unusual" refers to its frequency. *State v. Kingen*, 58 N.D. 327, 266 N.W. 505. Ordinarily, "cruel and unusual" punishment implies something inhuman and barbarous, or some punishment unknown at common law such as burning at the stake, breaking on the wheel, and the like, or some degrading punishment which the public sentiment must be regarded as having condemned as cruel or which, if ever employed at all, had become altogether obsolete in the state prior to the adoption of its constitution. *People v. Callicott*, 322 Ill. 390, 153 N.E. 688; *Ellis v. State*, 54 Okl. Cr. 295, 19 P. 2d 972. Moreover, the discretion of a state legislature will be interfered with only in extreme cases or unless the penalty prescribed by the statute is *clearly* and manifestly cruel and unusual. *Moore v.*

Aderhold, C.C.A. Kan., 108 F. 2d 729; *People v. Callicott*, supra; *Crutchfield v. Commonwealth*, 248 Ky. 704, 59 S.W. 2d 983. Thus a punishment authorized by statute is never held cruel or unusual or disproportionate to the nature of the offense unless it is a barbarous one unknown to the law or so wholly disproportionate to the nature of the offense as to shock the moral sense of the community. *Moore v. Aderhold*, supra; *People v. Elliott*, 272 Ill. 592, 112 N.E. 300.

Respondent has been unable to find a single case decided by any appellate court of last resort wherein such tribunal has concurred in petitioner's novel contention that a state penitentiary should be considered less penal than a county jail (this contention being made despite an entire absence in the printed record of any evidence to support petitioner's inferences as to the condition of county jails in the State of Iowa). Indeed, where the question has been considered, the courts have unanimously adopted the contrary position, namely, that confinement in a county pail is considered less penal than confinement in a state penitentiary, and that in case any doubt exists as to whether confinement should be in the penitentiary or a county jail the defendant should have the benefit of the doubt and be incarcerated in the latter institution. See *Brooks v. People*, 14 Colo. 413, 24 P. 553. *Gherna v. State*, 16 Ariz. 344, 146 P. 494; *State v. Masteller*, 232 Minn. 196, 45 N.W. 2d 109. Respondent submits that due process is not to be turned into a destructive dogma in the administration of systems of criminal justice, that it should not be used to furnish opportunities previously uncontemplated for opening wide the prison doors of our land, and that it was never intended to abridge the selection of the law-making power of the states of such kinds of punishment as they might deem most effective in the suppression of crime.

The statute here under attack was declared by the Supreme Court of Iowa, after a careful review of petitioner's complaints, not to be violative of the State's constitutional provisions against cruel and unusual punishment. (*State v. Di Paglia*, 247 Iowa . . ., 71 N.W. 2d 601, 604-5). Since the statute is not in violation of the Iowa Constitution, and

since the Eighth Amendment to the Federal Constitution in no way can apply in the case at bar, any punishment assessed by a trial court within the limits fixed by the statute cannot be said as a matter of law to be so "cruel and unusual" as to violate the Federal constitutional provisions relating to due process. One challenging a statute has the burden to overcome the presumption it is constitutional and to negative every reasonable basis on which it may be sustained. In this case petitioner has not met this burden.

CONCLUSION

For the foregoing reasons we respectfully request that petitioner's petition for a writ of certiorari be denied.

Respectfully submitted,

NORMAN A. ERBE,
Attorney General of Iowa,
State House,
Des Moines 19, Iowa

RAPHAEL R. R. DVORAK,
First Assistant Attorney General,
State House,
Des Moines 19, Iowa

DON C. SWANSON,
Assistant Attorney General,
State House,
Des Moines 19, Iowa
Attorneys for State of Iowa, Respondent

APPEARANCE

I, Don C. Swanson, a member of the Bar of the Supreme Court of the United States, do hereby enter my appearance as associate counsel for the State of Iowa, Respondent.

DON C. SWANSON,
State House,
Des Moines 19, Iowa

PROOF OF SERVICE

I, Don Hise, Attorney for Petitioner, Floren Di Pagiia, hereby acknowledge receipt of a copy of the foregoing Brief in behalf of State of Iowa, Respondent, in opposition to Petition for Writ of Certiorari, this .... day of February, 1957.

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Counsel for Respondent:

DON C. SWANSON,
Assistant Attorney General of Iowa,
State House,
Des Moines 19, Iowa.

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